Supreme Court, U.S.
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No. 94-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

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STATE OF SOUTH CAROLINA,

Petitioner,

vs

JAMES DONALD FOSSICK,

Respondent.

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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA**

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## QUESTIONS PRESENTED

I.

DID THE STATE COURT HEARING JUDGE ERR IN FINDING THAT THE SOLICITOR'S CLOSING ARGUMENT REFERENCE TO RESPONDENT'S LACK OF REMORSE CONSTITUTED A FIFTH AMENDMENT VIOLATION OF RESPONDENT'S PRIVILEGE AGAINST SELF-INCRIMINATION WHERE THE PRIVILEGE WAS WAIVED WHEN RESPONDENT VOLUNTARILY CONFESSED TO THE MURDER AND WHEN RESPONDENT TESTIFIED IN HIS OWN BEHALF AT TRIAL?

II.

DID THE SOUTH CAROLINA SUPREME COURT ERR IN FINDING THAT TRIAL COUNSEL'S FAILURE TO OBJECT TO THE SOLICITOR'S CLOSING ARGUMENT REFERENCE TO RESPONDENT'S LACK OF REMORSE CONSTITUTED A VIOLATION OF RESPONDENT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE REFERENCE DID NOT INFECT THE TRIAL WITH UNFAIRNESS SO AS TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE PROCESS AND WARRANTING REVERSAL OF THE CONVICTION?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Table of Contents | ii |
| Table of Authorities | iii |
| Opinion Below | 1 |
| Jurisdiction | 2 |
| Constitutional Provisions Involved | 2 |
| Statement of the Case | 4 |
| Reasons For Granting the Writ | 24 |
| I. | 25 |
| II. | 35 |
| Conclusion | 41 |
| Appendix A | A-1 |
| Appendix B | A-47 |
| Appendix C | A-50 |

## TABLE OF AUTHORITIES


Darden v. Wainwright,
477 U.S. 168 (1986) . . . 37-38, 39

Donnelly v. DeCristoforo,
466 U.S. 637 (1984) . . . . 37, 39

Griffin v. California,
380 U.S. 609 (1965) . . . . 28, 29

James Donald Fossick v. State,
___ S.C. ___,
453 S.E.2d 899 (1995) . . . . 2, 37

Jenkins v. Anderson,
447 U.S. 231 (1980) . . 28, 30, 31

McMann v. Richardson,
397 U.S. 759 (1970) . . . . . 27

Raffel v. U.S.,
271 S.C. 494 (1926) . . 28, 29, 30

Stewart v. U.S.,
366 U.S. 1 (1961) . . . . . 29

Strickland v. Washington,
466 U.S. 668 (1984) . . 27, 28, 40

United States v. Robinson,
485 U.S. 25 (1988) . . . . . 34

U.S. v. Hastings,
461 U.S. 499 (1983) . . . . 34, 37

U.S. v. Whitehead,
618 F.2d 523 (4th Cir. 1982) . . 30

28 U.S.C. §1257(3) . . . . . 2

S.C. Code §17-27-20
(1986 Cum. Supp.) . . . . . 3

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STATE OF SOUTH CAROLINA,

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vs

JAMES DONALD FOSSICK,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA**

Petitioner, State of South Carolina, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

## CITATION TO THE OPINION BELOW

The Order of the Richland County Court of Common Pleas is unreported and is attached to this Petition as Appendix A at pages A-1 - A-46. The Opinion of the Supreme Court of South Carolina affirming in part and reversing in part the Order of

the Court of Common Pleas is reported as James Donald Fossick v. State, ___ S.C. ___, 453 S.E.2d 899 (1995), and is attached to this Petition as Appendix B at pages A-47 - A-49. The Order of the South Carolina Supreme Court denying rehearing is unreported but is attached to this Petition as Appendix C at page A-50.

## JURISDICTION

The judgment of the South Carolina Supreme Court was entered on January 30, 1995. Rehearing was denied by the South Carolina Supreme Court on February 23, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part regarding criminal prosecutions, "the accused shall enjoy the right...to have

the assistance of counsel for his defense."

2. It also involves the Fifth Amendment which provides in pertinent part that an accused "...shall not be compelled in any case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law..."

3. This case additionally involves the Fourteenth Amendment to the United States Constitution which provides in pertinent part, "[N]or shall any state deprive any person of life...without due process of law, nor deny to any person within its jurisdiction the Equal Protection of the laws."

4. It also involves S.C. Code §17-27-20 (1986 Cum. Supp.), the Uniform Post-Conviction Procedure Act, which in pertinent part provides as follows:

> (a) Any person who has been convicted of...a crime and who claims:

> (1) That the conviction... was in violation of the Constitution of the United States...[or]
>
> (6) That the conviction... is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy;
>
> may institute, without paying a filing fee, a proceeding under this chapter to secure relief.

## STATEMENT OF THE CASE

### I. Procedural History

This matter comes before this Court pursuant to a Petition for Writ of Certiorari from the South Carolina Supreme Court's reversal of the state hearing court's denial of Respondent's post-conviction relief application.

Respondent, James Donald Fossick, is presently confined in the Broad River Correctional Institution of the South Carolina Department of Corrections pursu-

ant to orders of commitment of the Clerk of Court for Richland county. Respondent was indicted at the October 1985 term of the Court of General Sessions for the murder of Marilee Whitten. Respondent was represented at trial and on appeal by L. Lester Bates, III, as primary counsel. Mr. Bates was deceased at the time of the post-conviction relief evidentiary hearing. A jury trial was held on January 27-29, 1986, at the conclusion of which Respondent was found guilty of murder. Respondent was sentenced by the Honorable C. Anthony Harris to confinement for life.

The Respondent filed a timely Notice of Intent to Appeal and an appeal was perfected by Lester L. Bates, III, Esquire. After the filing of briefs in this case, oral argument was heard by the Supreme Court of South Carolina on June 11, 1987. On June 22, 1987, the South Carolina Supreme Court affirmed Respon-

dent's conviction and sentence in a Memorandum Opinion filed June 22, 1987 (Memo. Opinion No. 87-MO-300).

Thereafter, Respondent filed an application for post-conviction relief dated March 5, 1992, before the South Carolina Court of Common Pleas. Petitioner made return and supplemental return to the application on June 16, 1992, and February 5, 1993. An evidentiary hearing was held on February 12, 1993. No testimony was presented during the hearing. The parties made stipulations as to matters of fact and submitted trial briefs as to legal issues involved. An Order of Dismissal was issued by the South Carolina Court of Common Pleas on June 6, 1993, which denied and dismissed Respondent's application for post-conviction relief.

Respondent filed and served Notice of Intent to Appeal from denial of post-conviction relief and Petition for Writ of

Certiorari was made to the South Carolina Supreme court on December 9, 1993 and Petitioner made Return on January 25, 1994. Certiorari was granted and briefs were filed by Respondent on June 14, 1994, and by Petitioner on August 15, 1994. In a Memorandum Opinion dated January 30, 1995, the South Carolina Supreme Court reversed the circuit court order denying Respondent's post-conviction relief. On February 1, 1995, Petitioner petitioned the South Carolina Supreme Court for rehearing which petition was denied on February 23, 1995.

## II. Factual Background

### A. Trial and Direct Appeal

The victim in this case, Marilee Whitten, was last seen by her father on May 11, 1985 at 7:30 AM when he left the home for work. (Tr. p. 86 lines 2-18; p. 87 lines 10-19). Marilee had just begun part-time work as a groomer at an animal

clinic. (Tr. p. 86 lines 6-18). Marilee and her father planned to meet at home at 2:00 p.m. to shop for Mother's Day but Marilee never arrived. (Tr. p. 87 line 22 - p. 88 line 13). Emma Taylor saw the victim as late as "around 1:00 P.M. on May 11, 1985. She was reported missing that day. (Tr. p. 13 lines 11-15; p. 94 lines 5-8).

On May 11, 1985, Shane Parker met the victim, who had just begun work as a groomer in the animal clinic where the two flirted and Whitten gave Parker her telephone number. (Tr. p. 85; p. 98 line 14 - p. 99 line 14; p. 118 lines 4-16; p. 309 lines 14-22). Parker and Respondent worked in another section of the clinic that day but they and Whitten worked until approximately 1:10 PM or 1:15 PM. (Tr. p. 96 lines 14-24; p. 98 lines 14-18; p. 315 lines 17-18). After work, Parker observed the victim talking to Respondent in the

animal clinic parking lot (Tr. p. 100 lines 3-18). He also observed the victim at approximately 1:30 to 1:35 PM parked near the intersection of Quail Hill and Pointer Streets in the Quail Point subdivision. (Tr. p. 101 line 13 - p. 102 line 5). The victim was alone in her car with Respondent at her window talking and Respondent's car parked nearby. (Tr. p. 101 line 13 - p. 103 line 19; p. 105 lines 1-4). Parker called the victim's home twice later that day. Parker denied that he killed the victim with a tire iron or that he asked Respondent to "cover for him" (Tr. p. 105 lines 9-25). Parker never saw the victim again. (Tr. p. 124 lines 2-9; p. 126 lines 9-10). The victim's car was found in the Quail Point Subdivision on May 14, 1985 and her body was located nearby in a wooded area nude except for socks, lying on her back with her legs spread widely apart. (Tr. p. 132

line 20 - p. 134 line 4; p. 138 line 9 - p. 140 line 1; p. 141 lines 11-23). No unfamiliar hairs or fibers were found on the victim; none of the victim's hair or anything of evidentiary value was found in the Respondent's trunk in September, 1985, some four months later; and no blood, hair, or fiber from the crime scene matched Respondent or any other person. (Tr. p. 156 line 5 - p. 157 line 12; p. 165 lines 2-11; p. 166 lines 7-23; p. 166 lines 7-23; p. 172 lines 1-12). No fingerprints other than the victim's were found in the victim's car. (Tr. p. 171 lines 1 - 11; p. 172 lines 1-6). The cause of the victim's death was determined to be a head fracture caused by a large, heavy object. (Tr. p. 175 line 24 - p. 176 line 44). The victim presented injuries to the left arm and knees which were consistent with running and falling. (Tr. p. 176 line 24 - p. 177 line 6). Post-

mortem drag marks were visible on the victim's chest and legs and were consistent with the victim being dragged face down after death. (Tr. p. 177 lines 9-19; p. 178 lines 2-7; p. 183 lines 1-3). The pathologist opined that the victim had been dead approximately one week when her body was found. (Tr. p. 178 lines 13-22).

On May 16, 1985, Respondent reported to law enforcement officers that he last saw the victim with Shane Parker in the animal clinic parking lot and that he proceeded to Woodhill Mall to purchase a Mother's Day gift. (Tr. p. 198 lines 16-17; p. 204 lines 9-18; p. 211 lines 212 line 21). The following day, Respondent admitted leaving with Marilee and going with her to an Amoco station and that she followed his car from there to a "drug house" where he left the victim and Parker. (Tr. p. 205 line 12 - p. 207 line 3). During a second conversation with officers

that day, Respondent admitted he remained with the victim and that Parker left. (Tr. p. 207 line 4 - p. 208 line 17). On May 18, Respondent advised law enforcement officers that he told Marilee where she could get drugs and was guiding her there, last seeing her turn where he directed. (Tr. p. 226 line 19 - p. 227 line 12). Respondent gave a confession to law enforcement officers on September 4 in which Respondent indicated that he wanted to turn himself in for some time. (Tr. p. 238 lines 20-21). Respondent admitted that after Shane Parker left, the victim parked her car where police later found it and rode with Respondent on an unsuccessful trip to purchase drugs. (Tr. p. 238 line 13 - p. 239 line 4). Respondent admitted that he drove back to the victim's car and, after a struggle, pushed the victim into the trunk of his vehicle. (Tr. p. 239 lines 4-14). Respondent drove

to the neighborhood where the victim's body was later found and pulled into a wooded area there and opened the trunk. (Tr. p. 239 lines 14-16). When the victim got out of the trunk, she began to undress "because she knew what ... (he) was going to do." (Tr. p. 239 lines 16-18). Respondent admitted that when he pulled his pants down the victim started to run and he tripped her and that the victim bit and scratched him when he was on top of her. (Tr. p. 239 lines 18-20). Respondent admitted that he struck the victim's head twice with an urn, that he dragged her body, and that he left her lying on her back with her legs spread. (Tr. p. 239 lines 20 - p. 240 line 2). Respondent admitted that he removed gum from the victim's pants and went to Woodhill Mall and the other locations as previously disclosed by Respondent to law enforcement officers. (Tr. p. 240 lines 2-15).

Respondent admitted that the incident took approximately 30 to 45 minutes and displayed to law enforcement officers a scar on his arm caused by the victim's bite. (Tr. p. 240 line 22 - p. 241 line 24). Respondent directed law enforcement officer to the location Respondent previously described and Respondent pointed out the urn. (Tr. p. 241 line 25 - p. 242 line 19; p. 290 lines 5-12). Law enforcement officers reported that Respondent did not appear upset or show any emotion when he confessed or when he saw the urn. (Tr. p. 264 lines 14-20; p. 292 lines 5-6).

A defense witness was retained to prepare a map of the area with mileage figures and admitted that the victim's body was found approximately 300 yards from Respondent's home. (Tr. p. 297 lines 9-20; p. 298 line 6 - p. 299 line 4; p. 306 lines 19-25; p. 307 lines 3-6; p. 307 lines 10-12).

James Hester, testifying for the defense, stated that he passed telephone numbers between Parker and the victim at the animal clinic on the day the victim disappeared and stated that Parker and the victim expressed interest in each other. (Tr. p. 314 line 1 - p. 322 line 5).

Respondent also presented the testimony of an acquaintance who saw Respondent at Woodhill Mall at approximately 2:15 or 2:45 PM the day Marilee disappeared and stated that Respondent later asked him to go to court for him, however, the request was made by Respondent before the victim's body was found. (Tr. p. 324 lines 14-17; p. 326 lines 23 - p. 327 line 5; p. 327 lines 19-23; p. 329 line 2 - p. 331 line 8). A school friend of Respondent's also saw him that day at approximately 2:30 PM on Rosewood Drive. (Tr. p. 335 line 1 - p. 336 line 11). He was with Respondent until approximately 3:05 PM. (Tr. p. 339

line 11 - p. 340 line 17; p. 342 lines 2-15; p. 343 lines 2-8; p. 344 lines 7-13; p. 345 lines 10-13; p. 347 lines 3-12).

According to Respondent's parents, Respondent returned to his home at approximately 3:30 PM to 3:45 PM where he appeared and acted normal. (Tr. p. 349 lines 9-25; p. 363 lines 4-9; p. 363 lines 17-20). Respondent played basketball at approximately 4:15 PM to 6:00 PM and appeared normal. (Tr. p. 351 lines 20-21; p. 365 lines 24-25; p. 373 line 5 - p. 374 line 20; p. 383 lines 11-20; p. 384 lines 15-16).

Respondent testified in his own behalf and presented an alibi defense. Respondent denied killing the victim and asserted that he left the victim at the animal clinic parking lot with Shane Parker and that he went to Woodhill Mall, the Piggly Wiggly, the animal shelter and, lastly, home. (Tr. p. 411 lines 7-11; p.

414 line 25 - p. 415 line 12; p. 421 lines 8-12; p. 423 line 11 - p. 424 line 8; p. 425 line 2 - p. 426 line 2; p. 427 lines 4-5; p. 429 lines 2-5; p. 431 line 2 - p. 432 line 17; p. 434 lines 19-22; p. 435 lines 13-22). Later, Respondent played basketball at approximately 4:00 PM and returned home at 6:00 PM. (Tr. p. 435 lines 18-22; p. 436 lines 6-12; p. 437 lines 2-6). Respondent stated that Parker admitted killing the victim with a tire iron but Respondent did not report this to the police. (Tr. p. 440 lines 1-15; p. 440 line 23 - p. 441 line 4). Respondent also asserted that he gave the confession because of threats of the electric chair or promises from officers of psychiatric help and promises that officers would talk to the solicitor. (Tr. p. 451 lines 1-25). However, Respondent admitted he was familiar with the area where the victim's body was found and knew of its secluded

nature. (Tr. p. 476 lines 1-10). Respondent also displayed to the jury his ability to hold the urn and admitted that he would have no difficulty holding or throwing it. (Tr. p. 469 line 18 - p. 470 line 12). Evidence elicited earlier in the trial indicated that the ceramic vase or urn which was identified by Respondent as the murder weapon weighed eighteen pounds. (Tr. p. 170 lines 5-17).

In his summation to the jury, Respondent's attorney argued that the prosecution issued threats and promises to secure Respondent's confession; that Respondent had provided an incomplete alibi as a defense to the charge; that Respondent should be considered innocent because he was observed by others acting normally just after he was to have committed the offense which indicated he could not be guilty; and that the State's version of the facts was not credible. (Tr. p. 504,

line 1 - p. 521, line 20; p. 527, lines 1-24). Specifically, Respondent's attorney argued

> He went straight to Woodhill Mall, no blood on him, no chance to clean up, ran into people he really doesn't know -- Andy Anderson -- ran into people he really doesn't even know by chance, and thank God for chance meetings, ran into epople (sic) he didn't know, was acting perfectly normal with no blood or scratch marks.
>
> If you are going to convict James Fossick, you have to convince yourself beforehand that he could not murder somebody quickly, leave immediately, not have any blood on him, not be acting strange.
>
> I don't think a Mafia hit man would kill somebody and then go shopping for a Mother's Day present, hang out with his friends like he does every Saturday -- the way James does every Saturday -- and not have any blood, any scratch marks, not be upset, be acting normal. What did he do? He did what he probably does every Saturday. He went around and saw friends, hung out with them and then went off and played some basketball, came home, had supper with his mom and dad and then went to bed.

> The prosecutor wants you to believe that he could do that. "Well she's dead. I didn't get any blood on me. I better rush over to Woodhill Mall and look for a Mother's Day present." That's really what he wants you to believe.
>
> Does that make any sense? The State's story is just incredible. It's just incredible.

(Tr. p. 526, line 22 - p. 527, line 24). Lastly, Respondent's attorney argued to the jury that it was impossible for anyone to tell who actually committed the murder. (Tr. p. 529, lines 1-2). During the six-page closing argument from Solicitor Anders, the prosecutor urged sexual assault as Appellant's motive and that Appellant's confession was voluntary and valid. The prosecutor also asserted that Respondent's defenses of alibi, involuntary confession and absence of motive lacked credibility, including the following comment:

> It took him 28 minutes and 37 seconds. That's all it took

> him, 28 minutes and 37 seconds. He's got no remorse, no tears. He has got nothing, nothing. He wants you to be duped. He wants you to go back and say, "we've got Nazis on our Sheriff's Department that are going out and beating and forcing confessions out of people." Now, really, really. (Tr. p. 535, lines 19-25).

(Tr. p. 531, line 3 - p. 536, line 24).

The jury found Respondent guilty of murder and he was sentenced to confinement for life.

A timely Notice of Intent to Appeal was filed and an appeal was perfected by Lester Bates, Esquire. After filing briefs in this case, oral argument was heard by the South Carolina Supreme Court on June 11, 1987. On June 22, 1987, the South Carolina Supreme Court affirmed Respondent's conviction and sentence in a Memorandum Opinion. The issue concerning the Solicitor's closing argument comment was not raised on direct appeal.

B. **Collateral Proceedings**

In the Application for Post-Conviction Relief Respondent filed in the South Carolina Court of Common Pleas, he claimed, among other grounds, that he received ineffective assistance of counsel because trial counsel failed to object to the prosecutor's reference to his lack of remorse alleging that it constituted a comment upon his right to plead not guilty and put the State to its burden of proof. He asserted that it would be inconsistent for him to plead not guilty, present the defense of alibi, and then simultaneously express remorse for the act which he had denied committing.

The post-conviction relief hearing court determined that the Solicitor's references were inappropriate and improper but found that Respondent had failed to meet his burden of demonstrating that the comment so infected the trial with unfair-

ness as to make the resulting conviction a denial of due process. (See Appendix A at p. A-18).

On Appeal to the South Carolina Supreme Court from denial of Post-Conviction Relief, Respondent asserted that the prosecutor's comment constituted an impermissible reference to Respondent's right to remain silent and violated his right against self-incrimination and right to present a defense. Respondent challenged in his brief the strength of the State's case based upon disparity in portions of the Respondent's confession with the actual position of the victim's body; the fact that none of the victim's hairs or fibers were found in Respondent's vehicle; and because the murder weapon was heavy and no blood or hair was found on it. The South Carolina Supreme Court reversed the ruling of the Court of Common Pleas, finding error in the lower court's failure

to grant Post-Conviction Relief. The South Carolina Supreme Court concluded that trial counsel provided ineffective assistance when he failed to object to the Solicitor's closing argument reference to Respondent's failure to show remorse. The Circuit Court order denying Post-Conviction Relief was reversed. (See Memorandum Opinion No. 21488 submitted herein as Appendix B. p. A-47-49).

**REASON WHY THE WRIT SHOULD BE GRANTED**

The prosecutor's comment was not an impermissible reference to Respondent's right to remain silent, did not violate Respondent's rights against self-incrimination and right to present a defense, and did not infect the trial with unfairness so as to make the resulting conviction a denial of due process and, therefore, the failure of Respondent's attorney to object to the comment did not violate Respon-

dent's Sixth Amendment right to effective assistance of counsel.

I. **DID THE STATE COURT HEARING JUDGE ERR IN FINDING THAT THE SOLICITOR'S CLOSING ARGUMENT REFERENCE TO RESPONDENT'S LACK OF REMORSE CONSTITUTED A FIFTH AMENDMENT VIOLATION OF RESPONDENT'S PRIVILEGE AGAINST SELF-INCRIMINATION WHERE THE PRIVILEGE WAS WAIVED WAIVED WHEN RESPONDENT VOLUNTARILY CONFESSED TO THE MURDER AND WHEN RESPONDENT TESTIFIED IN HIS OWN BEHALF AT TRIAL?.**

Petitioner asserts that the South Carolina Supreme Court opinion below, that Petitioner was denied his Sixth Amendment right to effective assistance of counsel, was incorrect. As Petitioner urged to the hearing court and the South Carolina Supreme court below, the prosecutor's closing argument reference to Respondent's lack of remorse did not constitute an impermissible reference to Respondent's Fifth Amendment right to remain silent. Respondent waived the right by voluntarily and knowingly confessing to the murder and

by testifying at trial. The Solicitor's comment was not a reference to Respondent's failure to testify or to his post-arrest silence because neither are applicable to the facts of this case. The comment by the prosecution constituted a remark upon the credibility of Respondent's trial testimony and upon Respondent's demeanor while testifying and as an explanation for Respondent's cold, deliberate actions following the murder. The comment may not be considered a violation of Respondent's Fifth Amendment privilege against self-incrimination also because it constituted responsive summation invited by Respondent's closing argument to the jury. Because the prosecutor's comment was permissible, trial counsel's failure to object was neither deficient nor prejudicial. Respondent was not denied the Sixth Amendment Right to effective assistance of counsel. The finding otherwise

by the South Carolina Supreme Court was incorrect.

A criminal defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759 (1970). This Court in Strickland v. Washington, 466 U.S. 668 (1984), set forth a two part test to determine whether reversal of a conviction is warranted in a criminal case based upon ineffective assistance of counsel. A defendant must first show deficiency in trial counsel's performance. In making this determination:

> ...a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound strategy.'

Strickland v. Washington, 466 U.S. at 689-690. A criminal defendant must also satisfy the second prong of this Court's test which requires a showing that he was

prejudiced by counsel's performance. In Strickland, this Court determined that:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. 466 U.S. at 694.

Because there was no Fifth Amendment violation involved in this case, trial counsel's failure to object on that basis did not result in a Sixth Amendment violation of Respondent's right to effective assistance of counsel.

The Fifth Amendment to the United States Constitution provides that an individual may not be compelled to be a witness against himself. Raffel v. U.S., 271 S.C. 494 (1926); Griffin v. California, 380 U.S. 609 (1965); Jenkins v. Anderson, 447 U.S. 231 (1980). When a criminal defendant chooses not to testify

at trial, the Fifth Amendment prohibits the prosecutor from making reference to the accused's refusal to testify. Griffin v. California, 380 U.S. 609 (1965). The Fifth Amendment protects a criminal defendant from unfavorable inferences from the defendant's silence. Raffel v. U.S., supra. If a criminal defendant elects not to testify in his own behalf, the prosecutor may not comment or argue about the accused's failure to testify. Stewart v. U.S., 366 U.S. 1 (1961). However, the immunity provided by the Fifth Amendment is waived by an accused if the accused becomes a witness and testifies at trial in his own behalf. "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." Raffel v. U.S., 271 U.S. at 499. When an accused waives the privilege and offers himself as a witness, he

assumes the position of any other witness for purposes of cross-examination and credibility. Raffel v. U.S., supra; U.S. v. Whitehead, 618 F.2d 523 (4th Cir. 1982). Use thereafter by prosecutor of cross-examination and argument to impeach the accused's credibility is permissible. Jenkins v. Anderson, 447 U.S. 231 (1980).

> Once a defendant decides to testify, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.

Jenkins v. Anderson, 447 U.S. at 238.

Respondent's Fifth Amendment right was clearly not violated in this case, contrary to the South Carolina Supreme Court finding, because Respondent did not remain silent. He voluntarily confessed to the crime, after waiving his rights, and voluntarily testified at trial in his

own defense. Because of the confession and trial testimony, it was appropriate for the State to comment upon Respondent's mental status concerning the existence or non-existence of malice which was an element of the crime; to comment upon the credibility of Respondent's trial testimony which conflicted with Respondent's earlier confession; and to comment upon the credibility of Respondent's defense that, in addition to an imperfect alibi, Respondent could not have committed the offense because he acted normally shortly after the crime was to have been committed. Respondent placed his credibility, demeanor and conduct into evidence and rendered it ripe for comment. Impeachment by cross-examination and argument was permissible after Respondent's "own decision to cast aside his cloak of silence." Jenkins v. Anderson, 447 U.S. at 238. The state Supreme Court incorrectly concluded

that Respondent's Fifth Amendment right against self-incrimination was violated by the Solicitor's closing argument reference to Respondent's lack of remorse. Under the evidence it cannot be construed as an improper comment on Respondent's refusal to testify.

Also, Petitioner asserts that the Solicitor's comment upon Petitioner's lack of remorse was not a reference to Petitioner's Constitutional right against self-incrimination but, rather, was responsive to the evidence elicited during trial and to Respondent's summation to the jury. Specifically, Respondent presented a defense of incomplete alibi. Respondent also urged to the jury through defense witness testimony and closing argument that his lack of emotion and normal conduct of shopping and playing basketball shortly after the murder supported his claim of innocence. The prosecutor in

this case merely challenged the veracity of Respondent's defense by conveying to the jury in his argument that Respondent's lack of emotion was not indicative of innocence, but revealed that Respondent cold-bloodedly murdered the young victim with no thought thereafter of the consequences of his actions. The Solicitor referenced Respondent's lack of remorse as an alternative explanation to the jury for Respondent's unemotional state as a challenge to the credibility of Respondent's evidence and theory of defense. This comment concerning Respondent's lack of remorse was properly based upon the evidence elicited from defense witnesses concerning Respondent's demeanor and actions the day the victim was murdered; was based upon evidence elicited from officers that Respondent was not upset when he reported to them the deeds he committed or revealed to them the murder

weapon; was based upon Respondent's credibility and demeanor during his trial testimony; and was based upon defense counsel's argument to the jury concerning Respondent's post-murder demeanor. The prosecutor's argument did not improperly implicate the exercise by Respondent of his Constitutional Rights. It was an appropriate and responsive comment to Respondent's defense and the summation Respondent presented to the jury that he was innocent because he acted normal after the crime. It was proper rebuttal argument and did not violate Respondent's Fifth Amendment privilege. United States v. Robinson, 485 U.S. 25 (1988). The "protective shield of the Fifth Amendment should not be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on weaknesses in the defense case." Id, 485 U.S. at 32, citing U.S. v. Hastings, 461 U.S. 499

(1983). The prosecutor fairly responded to the argument of Respondent.

II. **DID THE SOUTH CAROLINA SUPREME COURT ERR IN FINDING THAT TRIAL COUNSEL'S FAILURE TO OBJECT TO THE SOLICITOR'S CLOSING ARGUMENT REFERENCE TO RESPONDENT'S LACK OF REMORSE CONSTITUTED A VIOLATION OF RESPONDENT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE REFERENCE DID NOT INFECT THE TRIAL WITH UNFAIRNESS SO AS TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE PROCESS AND WARRANTING REVERSAL OF THE CONVICTION?**

On appeal to the South Carolina Supreme Court from denial of post-conviction relief, Respondent asserted that the prosecutor's comment constituted an impermissible reference to Respondent's right to remain silent and violated his right against self-incrimination and right to present a defense. Respondent challenged in his brief the strength of the State's case based upon disparity in portions of the Respondent's confession with the

actual position of the victim's body; the fact that none of the victim's hairs or fibers were found in Respondent's vehicle; and because the murder weapon was heavy and no blood or hair was found on it. The South Carolina Supreme Court reversed the ruling of the Court of Common Pleas, finding error in the lower court's failure to grant Post-Conviction Relief. The South Carolina Supreme Court concluded that trial counsel provided ineffective assistance when counsel failed to object to the Solicitor's closing argument reference to Respondent's failure to show remorse.

In reviewing summation by the prosecution for reversible error, it must be determined whether the prosecutor's comments taken in context of the entire record, "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v.

Wainwright, 477 U.S. 168 (1986) and Donnelly v. DeCristoforo, 466 U.S. 637 (1984). Petitioner asserts that the state Supreme Court incorrectly found that "the Post-Conviction Relief judge erred in failing to grant Post-Conviction Relief when counsel did not object to solicitor's closing argument that...(Respondent) showed no remorse." Fossick v. State, supra. The prosecutor's closing argument reference to Respondent's lack of remorse did not so infect the trial with unfairness as to make the conviction a denial of due process. The conviction was correct on the merits, Respondent received a fair trial, and no other verdict could reasonably have been reached, rendering any error in the reference harmless. See U.S. v. Hastings, 461 U.S. 499 (1983) (Based upon overwhelming evidence of the accused's guilt in the record as a whole, any error in the prosecutor's comment on the

failure of the accused to testify was harmless).

There is strong evidence in the record of Respondent's guilt. Respondent, by his own admission and by the testimony of a State's witness was the last person to be seen with the victim in the vicinity where the victim's body was later found. Respondent confessed to the sexual assault and murder of the victim. The manner of death, condition of the body, instrumentality, and location of the instrumentality causing death all as confessed to by Respondent were consistent with what investigating officers found. Further, Respondent was not able to account for his whereabouts during the crucial period of time during which the murder was alleged to have occurred. Respondent also displayed a bite mark consistent to that he reported he received from the victim during the assault and murder. Respondent

gave officers conflicting versions until he was confronted. He also asked an acquaintance to go to court for him before the body had been found.

In the context of the entire trial and the overwhelming evidence of Respondent's guilt, the brief sentence uttered by the prosecutor in closing was, at most, ambiguous and did not render the trial so fundamentally unfair as to deny due process. Donnelly v. DeCristoforo, supra. The prosecutor's reference in this case must also be reviewed in context with the summation from defense counsel. Darden v. Wainwright, supra. As previously set forth in Argument I, the reference was invited by and was responsive to Respondent's closing argument to the jury. Whether comments are responsive is a factor to consider in determining the effect of the reference on the trial. Id. The overwhelming nature of the evidence,

the brevity of the comment, the responsive nature of the reference, and the ambiguity of the comment in question reduced the likelihood that the jury's verdict was influenced by the argument.

The state Supreme court incorrectly determined that Respondent showed requisite prejudice to support a finding of ineffective assistance of counsel. Considering the evidence in this case, there is not "a reasonable probability that, absent the error, the fact finder would have had a reasonable doubt respecting guilty." Strickland v. Washington, 466 U.S. at 695.

## CONCLUSION

The Petitioner for Writ of Certiorari should be granted.

Respectfully submitted,

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May 24, 1995
Columbia, South Carolina

(2) Supreme Court, U.S.
FILED

N 941939 MAY 24 1995

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

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STATE OF SOUTH CAROLINA,

Petitioner,

vs

JAMES DONALD FOSSICK,

Respondent.

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# A P P E N D I X

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| STATE OF SOUTH CAROLINA<br>COUNTY OF RICHLAND | IN THE COURT OF<br>COMMON PLEAS |
| James Donald Fossick, 132291,<br>Applicant,<br>vs.<br>State of South Carolina,<br>Respondent. | 92-CP-40-1193<br><br>ORDER OF<br>DISMISSAL |

This matter arises pursuant to a Post-Conviction Relief Application dated March 5, 1992. Respondent made its Return on June 16, 1992 and Supplemental Return and February 5, 1993. An evidentiary hearing was held on February 12, 1993, at which time Applicant was present and was represented by Ben N. Miller, Esquire, of the Richland County Bar. Respondent was represented by Salley W. Elliott, Deputy Attorney General.

At the hearing, the parties made stipulations as to matters of fact and requested permission to submit trial briefs as to the

legal issues involved. The court also had before it a copy of the transcript of the proceedings had against Applicant; the records of the Richland County Clerk of Court in the case, the records of the South Carolina Department of Corrections in the case; Applicant's Proposed Case and Exceptions on direct appeal; the South Carolina Supreme court Memorandum Opinion in the direct appeal; Respondents exhibits; and the stipulations of fact.

**Statement of Proceedings**

The records before this Court indicate that Applicant, James Donald Fossick, is presently confined in the Broad River Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the October 1985 term of the Court of General Sessions for Richland County for murder. Applicant was represented by L. Lester

Bates, III, Esquire, as primary trial counsel. Also present during the trial were William R. Bauer, Esquire, and James N. Parr, Jr., Esquire. A jury trial was held on January 27-29, 1986, at the conclusion of which the Applicant was found guilty of murder. Applicant was sentenced by the Honorable C. Anthony Harris to confinement for life.

The Applicant filed a timely Notice of Intent to Appeal and, an appeal was perfected by Lester L. Bates, III, Esquire. The Applicant briefed the following questions on direct appeal:

> (1) whether the trial court erred in admitting into evidence Applicant's confession;
>
> (2) whether the trial court erred in failing to properly charge the jury regarding the voluntariness of the confessions;
>
> (3) whether the trial court erred in failing to properly charge the jury regarding the law of malice;
>
> (4) whether the trial court erred in allowing the State to refer to the Defendant's religious beliefs;

(5) whether the trial court erred in failing to charge the jury that the State must prove the Defendant murdered the deceased.

In exceptions raised but not briefed to the Supreme

Court, Applicant raised the following:

(1) whether the lower court erred in not granting a mistrial after motion by Applicant's attorney concerning Applicant's regard for the Bible because it was unduly prejudicial;

(2) whether the lower court erred in not allowing Applicant's jury charge number five which requested an instruction that the State prove the Defendant committed the murder because without the instruction the legal standard of proof for a murder conviction was lessened;

(3) whether the lower court erred in not charging the jury that malice cannot be presumed solely from the use of a deadly weapon, the error being the charge requested was applicable to the facts of the case and was a correct statement of law not otherwise included.

After filing briefs in this case, oral argument was heard by the Supreme Court of South Carolina on June 11, 1987. On June 22, 1987, the South Carolina Supreme Court

affirmed Applicant's conviction and sentence in Memorandum Opinion No. 87-MO-300 filed June 22, 1987.

**Issues Raised by Way of Application For Post-Conviction Relief**

In the Application for Post-Conviction Relief, Applicant alleges as grounds for relief that he received ineffective assistance of counsel because:

> (1) trial counsel provided ineffective assistance when he failed "to accept the trial court's instruction to the jury regarding Applicant's statement of nonreligious beliefs;"
>
> (2) trial counsel provided ineffective assistance of counsel when he failed "to object to the Solicitor's improper reference to Applicant's lack of remorse in the Solicitor's "closing arguments;"
>
> (3) trial counsel provided ineffective assistance when counsel failed "to object to the reasonable doubt charge by the court;"
>
> (4) trial counsel provided ineffective assistance when counsel failed "to object to the jury instruction shifting the burden of proof to the Applicant;"
>
> (5) trial counsel provided ineffective assistance when counsel

failed "to object to the trial court's erroneous malice instruction;"

(6) trial counsel provided ineffective assistance when counsel failed "to challenge for cause the seating of Assistant United States Attorney, Mr. Emory Clark, as a prospective juror."

Applicant made no amendments to the Application during the evidentiary hearing. Without objection, Respondent amended its Return by adding the January 31, 1986 transcript; Appellant's and Respondent's briefs on direct appeal; Appellant's proposed case and Exceptions on direct appeal; and Supreme Court Memorandum Opinion No. 87-MO-300 in Applicant's direct appeal.

**Stipulations**

The parties made the following stipulations of fact:

(1) Lester Bates, III acted as Applicant's primary counsel, and Mr. Bates died Thanksgiving Day, 1991. Respondent is unable to elicit from Mr. Bates specific testimony as to the issues Applicant raises in his Post-Conviction Relief Application;

(2) The role of William R. Bauer, Esquire, was to sit at counsel table during Applicant's trial and assist Lester Bates, III during trial, and due to the passage of time since the trial, Mr. Bauer has little specific recollection of discussions as to trial strategy on the issues Applicant now raises;

(3) James N. Parr, Jr., Esquire, was in the same law firm as Lester Bates, III, and assisted in research and brief writing during the initial stages of Mr. Bates' representation of Applicant and interviewed Applicant a few times. However, during the later stages of representation, Mr. Parr's role was merely to sit at counsel table during trial;

(4) Counsel thoroughly, diligently, and extensively investigated and prepared this case for trial, including investigation and research into the jury and the law on reasonable doubt and malice;

(5) Counsel for Applicant researched the potential jurors, reviewed the jury list, and made a decision to include juror Emory Clark because counsel thought a lawyer would better understand Applicant's confession defense, as well as the timing involved in Applicant's defense of alibi. Counsel specifically, counsel wished to have the juror about which Applicant now complains sit on Applicant's jury;

(6) In 1986, the United States Attorney's office was located in

the Federal Building at the corner of Laurel and Assembly Streets in Columbia, South Carolina;

(7) In 1986, the Federal Building was a federally owned building in which the federal government leased office space to federal agencies, including the Bankruptcy Court on two floors and the United States Attorney's office on the first and separate floor from the Bankruptcy Court;

(8) In 1986, the United States District Court Courthouse was across the street from the Federal Building;

(9) Subsequent to 1986, the United States Attorney's Office was relocated to the IBM Building on Main Street in Columbia, South Carolina.

The parties also consented to the introduction into evidence of the following Respondent's exhibits:

(1) Trial counsel's juror strike sheet;

(2) Request for jury charge numbers one and two as submitted by trial counsel;

(3) Trial counsel's notes for oral argument to the Supreme Court;

(4) Voir dire questions submitted by trial counsel;

(5) Trial counsel's billing statements;

(6) Trial counsel's jury list;

Applicant made no amendments to the application during the evidentiary hearing.

**Ineffective Assistance of Counsel**

Applicant contends that he received ineffective assistance of trial counsel and raises numerous allegations in support of his claim. It is clear that a criminal defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759 (1970). This Court finds that Applicant's attorneys were diligent in their representation of the Applicant and that the attorneys' performance was well within the range of competence demanded of attorneys in criminal matters. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977). The United States Supreme Court has set forth a two-prong test to determine whether a conviction should be reversed based upon inef-

fective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). A defendant must first show a deficiency in counsel's performance. In making this determination:

> ...(A) court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the Defendant must overcome the presumption that under the circumstances, the challenged action 'might be considered sound strategy.'

Strickland v. Washington, supra, at 80 L.Ed. 694, 695.

To reconstruct the circumstances of the challenged conduct, the court must also eliminate the effects of hindsight and evaluate the conduct from counsel's perspective at the time. Strickland v. Washington, supra, at 694.

Applicant must also satisfy the second prong of the Supreme Court's test which requires a showing by Applicant that he was prejudiced by counsel's performance. Stri-

ckland v. Washington, supra. In Strickland, the Supreme Court determined that:

> The Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

It must be determined whether there is "a reasonable probability that absent the errors, the fact/finder would have had a reasonable doubt respecting guilt." Strickland v. Washington, supra, at 80 L.Ed 698. In reviewing an ineffective assistance claim, this court must also review counsel's performance based upon the totality of the circumstances and be mindful that "even the best criminal defense attorneys would not defend a particular client in the same way." Strickland v. Washington, supra. The Court must also keep in mind that "even the best criminal defense attorneys would not defend a particular client in the same way." Strickland v. Washington, supra, at 80 L.Ed 2d 695. Also, matters of trial strategy do

not constitute ineffective assistance. Strickland v. Washington, supra. For the reasons set forth below, this Court finds that Applicant has failed to meet his burden of proof with regard to ineffective assistance of trial counsel.

A. Counsel declines curative instruction.

At Applicant's trial and during the direct examination of Investigator Fuller concerning Applicant's confession, the prosecution asked Investigator Fuller whether Applicant made any reference to the Bible during Fuller's interview of Applicant. Fuller replied that, upon showing Applicant the Bible and asking Applicant what it was, Applicant responded that it looked like the Bible but the Bible was just another book to him. (Tr. p. 246, line 19 - p. 247 line 3). Trial counsel immediately objected to the testimony and requested that it be stricken from the record. (Tr. p. 247 lines 4-5). The prosecutor responded that he would not

question further on that point. (Tr. p. 247 lines 6-8). At the conclusion of the witness' testimony and in the jury's absence, trial counsel moved for a mistrial based upon the testimony of the investigator and his reference to Applicant's characterization of the Bible. Trial counsel argued to the trial court that the colloquy was an improper reference to Applicant's beliefs. (Tr. p. 268 lines 12-19; p. 269, lines 7-18). Counsel argued that his research as to the jury members would indicate that they are deeply religious and would be offended by the remark. (Tr. p. 269 lines 15-18). The trial court denied the motion for mistrial but indicated it would give a curative instruction regarding the reference to the Bible. (Tr. p. 268 line 24; p. 269 lines 19 - p. 270 line 1). Trial counsel declined the trial court's offer to give a curative instruction stating that such an instruction "would merely call the jury's attention to

it..." (Tr. p. 2-5). At the conclusion of the case for the State and again when the defense rested, trial counsel moved for a mistrial upon this ground, but both motions were denied by the trial court. (Tr. p. 295, lines 16-20; p. 44, lines 9-12). Counsel also included this as grounds for motions after the guilty verdict. (Tr. p. 561 lines 1-14). Applicant's counsel also raised this issue to the South Carolina Supreme Court on appeal, arguing that it was irrelevant and impermissibly put Applicant's character in issue. The Supreme Court affirmed the conviction.

Applicant complains in his Post-Conviction Relief Application that trial counsel provided ineffective assistance when he declined the trial court's offer of a curative instruction. This Court finds that trial counsel declined the trial court's curative instruction concerning reference to the Bible based upon trial strategy. It was

obviously trial counsel's opinion that the curative instruction would only highlight for the jury the testimony which he felt prejudicial, further compounding the reference, particularly where the testimony was properly elicited by the State in response to Applicant's defense that Bible verses read to Applicant were used to attempt to coerce the confession from him. (Tr. p. 270 lines 2-5). (See Respondent's Brief on appeal pp. 20-25). Trial counsel's strategy was reasonable and did not constitute ineffective assistance.

B. Reference to remorse.

During summation to the jury, Solicitor Anders argued:

> It took him 28 minutes and 37 seconds. That's all it took him, 28 minutes and 37 seconds. He's got no remorse, no tears... Go back and vote guilty and come back in here and tell people like this, without remorse, without feeling, without anything, that 'we aren't going to tolerate it here in our county.'

(Tr. p. 35 lines 19-21; p. 536 lines 21-24). Trial counsel did not object during the argument and the issue was not raised on direct appeal.

In his Post-Conviction Relief Application, Applicant complains that the solicitor's reference to Applicant's lack of remorse was improper in that it constituted a comment upon Applicant's right to plead not guilty and put the State to its burden of proof. He asserts that it would be inconsistent for him to plead not guilty, present the defense of alibi, and then simultaneously express remorse for the act which he has denied committing.

The South Carolina Supreme Court has ruled that an accused has a constitutional right to plead not guilty and put the State to its burden of proof, to act as his own attorney, to confront witnesses, and that when an accused asserts one of these constitutional rights, it is impermissible for the

State to comment or argue in favor of guilt based upon that assertion. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). Specifically, the Court has held that an accused has the right to put the State to its burden of proof, and it is improper for the State to argue in favor of guilt based upon that action. State v. Johnson, supra; State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986). See also Griffin v. California, 380 U.S. 609 (1965); State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981). A solicitor must confine his argument to the record and its reasonable inferences. State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22 (1988).

This Court funds the references during the solicitor's argument to Applicant's lack of remorse were inappropriate and improper. However, Applicant has the burden of demonstrating that the solicitor's argument had the effect of denying him a fair determination of the issues involved.

State v. Coleman, 301 S.C. 57, 389 S.E. 2d 659 (1990). In viewing the portion of the argument about which Applicant complains in the context of the entire record, State v. Copeland, 278 S.C. 572, 300 S.E. 2d 63 (1982), Applicant cannot show that the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Caldwell, 300 S.C. 494, 388 S.E. 2d 816 (1990); State v. Gaskins, 284 S.C. 105, 326 S.E. 2d 132 (1985); State v. Hawkins, 357 S.E. 2d 10 (1987); Donnelly v. DeCristoforo, 416 U.S. 637 (1974); Darden v. Wainwright, 477 U.S. 187 (1986). In this case there is strong evidence of Applicant's guilt. The record reflects the trial court charged that jury members were the sole judges of the facts which must be decided upon the evidence consisting of testimony and exhibits (and inferentially not arguments of trial counsel and the prosecution). The solicitor's use

of the word "remorse" twice during his closing argument is a minuscule part of the record in comparison to the record as a whole. Error, if any, was harmless. Applicant has not shown counsel's failure to object constituted deficient performance or was prejudicial, and indeed it may have been trial strategy.

C. Reasonable doubt.

At the close of the evidence, the trial court presented its charge to the jury. With regard to reasonable doubt, the trial court charged as follows:

> That phrase has no magical qualities. Beyond a reasonable doubt means the same thing when used in a legal sense as it does in ordinary everyday English language; and that is a doubt for which you have a real reason. It excludes the whimsical or fanciful doubt because you could doubt any proposition if you wanted to. A reasonable doubt means a substantial doubt for which honest people seeking the truth can give a real reason.

(Tr. p. 543 line 22 - p. 544 line 5).

After the trial court's charge to the jury, trial counsel objected to the trial court's reasonable doubt charge because the trial court failed to give counsel's requested charge. (Tr. p. 553 lines 13-14). (See Respondent's Exhibit #2 - Jury Charge Requests 1 and 2). Counsel requested in charge 2 that the jury be instructed that "a reasonable doubt may arise solely from a lack of evidence produced by the State as to any of the elements of murder." (Tr. p. 553 lines 13-17; Exhibit #2). In charge 1, he requested with regard to alibi that the burden was upon the State and where there was reasonable doubt regarding the evidence, the Applicant must be acquitted. The trial court denied the trial counsel's request stating that the jury was fully charged on reasonable doubt and needed no further charge. (Tr. p. 553 lines 18-20). The issue was not raised on appeal to the South Carolina Supreme Court.

In his Application for Post-Conviction Relief, Applicant complains that the trial court erred when it equated reasonable doubt with substantial doubt. He asserts that as substantial doubt requires a higher degree of doubt than reasonable doubt, the jury could have interpreted the instructions to allow a finding of guilty based on a degree of proof below that required by the Due Process Clause. This Court notes that trial counsel initially made a specific request for a reasonable doubt instruction which provided no definition of reasonable doubt and which was denied by the trial court.

Secondly, this Court finds that counsel's failure to object to the reasonable doubt charge did not constitute ineffective assistance because the charge correctly reflected the law at the time it was given. At the time of Applicant's trial, the United States Supreme Court and the Fourth Circuit Court of Appeals, while criticizing attempts

to define reasonable doubt as "substantial," "real," or "actual" doubt or "reasonable moral certainty," determined that it was not a per se constitutional violation. Taylor v. Kentucky, 436 U.S. 475 (1978); See Murphy v. Holland, 776 F.Ed.2d 470 (4th Cir. 1985); U.S. v. Love, 767 F.2d 1052 (4th Cir. 1985). The South Carolina Supreme Court has consistently ruled it was not erroneous to define reasonable doubt as substantial doubt and doubt for which you can give reason. State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982). The Court of Appeals has specifically upheld the convictions when similar instructions were used in Gaskins v. McKellar, 916 F.Ed.2d. 941 (4th Cir. 1991). Trial counsel's conduct must be assessed under the prevailing professional norms at the time of trial. Strickland v. Washington, supra. Even if he had not requested other reasonable doubt charges, trial counsel's reliance upon the State Supreme

Court's ruling on this issue was reasonable. Trial counsel's conduct was, therefore, not deficient.

While review of counsel's conduct normally ends when Applicant fails to present proof of the deficiency, this Court additionally and alternatively finds that Applicant has failed also to show prejudice in trial counsel's failure to object to the reasonable doubt charge. Had counsel objected to the reasonable doubt charge, the objection would have been overruled based upon the prevailing law in the state at the time. Applicant also fails to show prejudice because the jury instruction given on reasonable doubt, even if given today, would not violate Applicant's rights to due process under the 1990 United States Supreme Court decision of Cage v. Louisiana, ____ U.S. ____, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) by unconstitutionally diluting the state's burden to establish beyond a reason-

able doubt each element of the offense with which he was charged.

> The Due Process Clause of the Fourteenth Amendment "safeguard[s] against dilution of the principle that guilt is to be established by probative evidence beyond a reasonable doubt." Taylor v. Kentucky, 436 U.S. 487, 98 S.Ct. 1930, 1935, 56 L.Ed.2d 468 (1978). An instruction is defective if a reasonable juror could interpret it to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause, Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

The language and term combinations found infirm by the United States Supreme Court in Cage and by the South Carolina Supreme Court in State v. Manning, 305 S.C.413, 409 S.E.2d 372 (1991) are either not present in the reasonable doubt charge under review by this Court or are not present in the combinations found misleading. See State v. McLemore, ___ S.C. ___, 425 S.E.2d 752 (1992); State v. Johnson, ____ S.C. ____, 410 S.E.2d 547 (1991). See also, Gaskins v. McKellar, 111 S.Ct. 2277 (1991),

(In denying certiorari, Justice Stevens noted no constitutional infirmity in the reasonable doubt charge which made no reference to the term "doubt as would give rise to a grave uncertainty" which was present in the Cage instruction.) See Cage v. Louisiana, supra. As in Gaskins v. McKellar, supra, this instruction did not contain the language "grave uncertainty" coupled with "moral certainty." Gaskins affirmed the "substantial doubt" and "doubt for which you can give reason" language used in the jury charge under review here. Also, the Court's contrast of reasonable doubt with the term, "not whimsical doubt or fanciful doubt" has been upheld in State v. Johnson, supra; and State v. McElmore, supra, as has the language "substantial doubt," State v. Johnson, supra; and "a real doubt for which you can give reason." State v. McElmore, supra. The reasonable doubt charge given in this case was not such as to lead a reason-

able juror to understand the charge as a whole as allowing a finding of guilt based upon a degree of proof below that required by the Due Process Clause.

This Court finds that the allegation should be dismissed for the primary reason that Applicant has failed to show deficient performance because trial counsel made the appropriate request to charge regarding reasonable doubt and because the charge given was correct in 1986. Trial counsel is not required to anticipate changes in the law or future adoption of new rules. This Court also finds that Applicant has failed to show prejudice because an objection would not have been granted and because the charge given during the 1986 trial is not constitutionally infirm under a current review. Applicant's assertion is without merit and should be denied and dismissed.

D. Burden of proof.

In instructing the jury regarding the State's burden of proof, the trial court charged as follows:

> The State, the prosecution in a case, has the burden of proving the material elements of the charge made against the Defendant. That is the most proper assignment of the burden of proof. We have a situation in any criminal case in which the State, through its various law enforcement agencies and offices and the Solicitor, whose job it is to prosecute any alleged violations of the law in this circuit. Together they make a charge against the Defendant.
>
> So, when we come to the trial of that charge, it is quite proper for the law to say to the person or parties <u>making the charge</u>, "Prove it. Don't just charge the Defendant with a crime. Prove it to the jury which we will impanel to listen to your evidence."
>
> So, that is the basis of the burden of proof. <u>Those asserting the affirmative of some particular issue would have the burden of proving it. Here the State charges the Defendant with murder. Quite properly, the State says, "Prove it and prove it beyond a reasonable doubt."</u>

(Emphasis added). (Tr. p. 543 lines 2-21). Thereafter, the trial court charged the jury as to reasonable doubt and the fact that the

State must establish the material elements of a charge made against the Applicant. (Tr. p. 543 lines 22 - p. 544 line 8). The trial court also charged the jury as to Applicant's presumption of innocence which presumption remains with the Applicant throughout the trial. The trial court further charged the jury that the burden of proving alibi does not shift to the Applicant and reminded the jury repeatedly that the prosecution has the burden of proving every material element of the crime charged. (Tr. p. 542 lines 14-17; p. 547 lines 9-18; p. 551 lines 7-10).

Appellant asserts that the following portion of that charge was erroneous:

> Those asserting the affirmative of some particular issue would have the burden of proving it. Here the State charges the Defendant with murder. Quite properly the State says, "Prove it and prove it beyond a reasonable doubt."

(Emphasis added). (Tr. p. 543 lines 17-21).

Applicant asserts that this portion of the charge was an incorrect statement of the law because he interprets it as an instruction to the jury that he had the burden of proving that he was not guilty. He asserts that trial counsel provided ineffective assistance when counsel failed to object to this portion of the charge.

This Court finds that Applicant's assertion is completely without merit. A reading of the portion of the charge about which Applicant complains in context with those portions preceding and following clearly reflect the trial court was charging to the jury that it is the State which bears the burden of proving Applicant's guilt. The trial court was charging that it is the State which requires that the prosecution -- which is the party making the charge -- to prove Applicant's guilt beyond a reasonable doubt. A jury charge must be taken in context as a whole rather than isolating one

or two sentences. Francis v. Franklin, supra; Cupp v. Naughten, 414 U.S. 141 (1973). Applicant has failed to show a reasonable likelihood that the jury applied this instruction so as to require Applicant to prove his innocence. Estelle v. McGuire, 112 S.Ct. 475 (1991). Counsel's failure to object was entirely appropriate and did not constitute ineffective assistance. Applicant's allegation is without merit and should be denied and dismissed.

E. Malice instructions.

Applicant complains that the solicitor, in his summation to the jury, argued that malice "can be inferred through the use of a deadly weapon." (Tr. p. 532 lines 11-12). He also complains about the following court instruction to the jury on malice:

> You, Mr. Foreman, members of the jury, may infer malice from the wilful, deliberate and the intentional doing of an unlawful act without just cause or legal excuse. You may infer malice from the use of a deadly weapon in the inflection of the fatal wounds.

> I tell you that a deadly weapon is defined as any object which is readily usable for the inflection of serious bodily injury on another person.

(Tr. p. 545 line 19 - p. 546 line 2).

Applicant complains that the trial court in this charge instructed the jury that it may infer malice from the wilful, deliberate and intentional doing of an unlawful act without just cause or legal excuse. He asserts that trial counsel "should have objected to this kind of jury instruction because the jury could have mistakenly--inferred from the confusing instructions that the intent--required to prove murder was that Applicant hit the victim with an urn." (See Attachment (c) of the PCR Application). Applicant alleges the record fails to reflect that he intended to kill anyone. He contends that the record is unclear as to his intent to kill the victim. He complains that the court "cannot infer beyond a reasonable doubt that the presump-

tions did not contribute to the jury's finding of Applicant's intent to kill the victim."

During Applicant's trial, the trial court charged the jury as follows:

> In this case the defendant is charged with the crime of murder. Murder is the unlawful killing of another human being with malice aforethought, either express or implied.
>
> In order to convict one of murder, the State must not only prove the killing of the deceased by the defendant, but that it was done with malice aforethought; and that proof must be, as I told you earlier, beyond a reasonable doubt.
>
> Malice is defined in the law of homicide -- homicide means killing a human being -- malice is defined in the law of homicide as a term of art, that is, it's a technical term, which imports wickedness and excludes any just cause or excuse. It is something which springs from wickedness, malice. It springs from depravity, from a deprived spirit, from a heart devoid of social duty and fatally bent on mischief. One, not then, having due regard for the social obligations, and the obligations which rest on all mankind as we live here together.

The words express or implied, which I have used in the definition of murder, do not mean two different kinds of malice. They mean to express to you two different methods by which malice might be proven.

Malice may be express as where previous threats of vengeance have been made or where someone lies in wait for someone else to come by so that an assault might be made on that person or any other circumstances which show directly that an intent to kill was really and actually entertained.

Malice may also be implied as where, though no express intention to kill was proved by the direct evidence, it is indirectly and necessarily inferred from facts and circumstances which are themselves proven.

You, Mr. Foreman, members of the jury, may infer malice from the willful, deliberate and the intentional doing of an unlawful act without just cause or legal excuse. You may infer malice from the use of a deadly weapon in the infliction of the fatal wounds.

I tell you that a deadly weapon is defined as any object which is easily and readily usable for the infliction of serious bodily injury on another person.

In its general signification, malice means the doing of a wrong-

ful act intentionally without justification or excuse.

I tell you, Mr. Foreman, members of the jury panel, that if the factual situation has been proved from which you infer the existence of malice from certain factual situations which I have described for you, you may use such inferences, along with all the other evidence which has been presented, in making your determination as to whether malice existed in the mind and heart of the defendant at the time of the striking of the fatal blow.

You recall that I told you in the definition of murder that there must be malice aforethought. The law does not require that malice exist for any particular length of time before the commission of an act, but it must be aforethought, that is, it must exist for at least some time prior to the commission of the act. There must be a combination of a previous evil intent and the act which produces the fatal result.

I tell you that the State is not required to prove a motive for a killing.

(Emphasis added). (Tr. p. 544 line 9 - p. 546 line 25).

At the conclusion of the trial court's charge, trial counsel requested that the

Court give the Elmore charge with regard to malice. Trial counsel argued that the trial court failed to charge the jury that where facts produced by the State are sufficient to raise an inference of malice, the inference is simply an evidentiary fact to be considered, and that the jury may give it such weight as they determine appropriate. (Tr. p. 553 line 22 - p. 554 line 13). The trial court declined to further charge the jury on malice, stating that the charge given was sufficient. (Tr. p. 554 lines 14-24; p. 55 lines 1-4). Included in his brief to the South Carolina Supreme Court on appeal, trial counsel specifically raised and argued the trial court's failure to give the charge as specifically worded in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Respondent's Exhibit 3 (trial counsel's Supreme Court argument notes) indicates this issue was presented during oral argument on appeal. The parties have

stipulated that trial counsel had researched the law regarding malice. This Court finds that trial counsel's action was reasonable with regard to the implied malice charge Applicant now raises. While Applicant contends a presumption was created, this Court finds that the record is devoid of presumption in the charge which shifted the prosecutorial burden of proof. See Francis v. Franklin, 471 U.S. 307 (1985). The charge contains none of the words which have been recognized as unacceptable burden shifting presumptions such as "presumption," "rebuttal," "reasonable explanation," or "unless to the contrary be proved." See State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). The charge does not require Applicant's rebuttal or explanation of evidence presented against him and makes it clear that it is for the jury to decide from all the evidence whether malice is proven. See State v. Gathers, 295 S.C. 476, 369

S.E.2d 140 (1988). See also Smith v. State, Op. No. 23738 (S.C. Sup. Ct. filed Nov. 16, 1992). The allegation is without merit and should be denied and dismissed.

F. Juror.

Lastly, Applicant asserts that juror, Emory Clark, was improperly permitted to serve on his jury. He asserts that during voir dire Mr. Clark stated that he was employed in the civil division of the United States Attorney's Office. Applicant complains that trial counsel should have challenged the seating of Mr. Clark as a juror because a "natural bond" may exist between state and federal prosecuting entities. He also contends that Mr. Clark should have been disqualified from serving on the jury pursuant to S.C. Code Ann. §14-7-820. It is Applicant's assertion that Mr. Clark was employed within the walls of a courthouse.

The record reflects that when Applicant's case was called for trial, the mem-

bers of the jury panel had been qualified to serve as jurors earlier that week by Judge Kinon. (Tr. p. 3 lines 20-23). Thereafter, Judge Harris conducted voir dire of the jury panel for Applicant's trial to determine any bias or interest the particular jury members. (Tr. p. 4 line 9 - p. 11 line 11). During voir dire, juror Clark, advised the trial court that he was an Assistant United States Attorney but that he was employed in the civil division rather than the criminal division. (Tr. p. 7 lines 14-15). Thereafter, the jury was impaneled and Mr. Clark served on Applicant's jury. (Tr. p. 11 line 18). It has been stipulated that Mr. Clark, as Assistant United States Attorney in 1986, worked in offices located on one entire floor of the Federal Building which was also the same building in which the United States Bankruptcy Court leased office space. Applicant complains because the juror's office was located in the same building as

the Bankruptcy Court that he was employed within the walls of a courthouse.

An accused in a criminal prosecution is entitled to a competent and impartial jury, and it is the duty of the trial judge to see that a jury of competent, fair, and impartial jurors is impaneled. State v. Cooper, 353 S.E.2d 441 (1986). In January 1986, S. C. Code Ann. §14-7-820 provided:

> No clerk or deputy clerk of the court, constable, sheriff, probate judge, county commissioner, magistrate or other county officer or any person employed within the walls of any court house shall be eligible as a juryman in any civil or criminal case.

While the South Carolina Supreme Court has ruled that once a trial judge determines a potential juror is employed in any capacity within a courthouse, he must disqualify the person from jury service, State v. Reed, 362 S.E.2d 13 (1987), the Court has also adopted a functional approach in interpreting and applying the provisions of this statute. State v. Cooper, supra. The South

Carolina Supreme Court has determined that a special deputy sheriff whose duty was to serve process was not disqualified from serving as a juror pursuant to this statute. Bryant v. State, 213 S.E.2d 451 (1975). The Court has also determined that a highway patrolman was an officer of the State who had broad authority and was equivalent to a deputy sheriff and should have be disqualified. State v. Cooper, supra. However, the Court has also determined that a criminal investigator with the United States Navy was not disqualified under S.C. Code Ann. §14-7-820 as he held none of the offices or positions listed within that statute. State v. Matthews, 291 S.C. 339, 353 S.E.2d 444 (1986). The Court also recognized that magistrates were disqualified from serving pursuant to the statute because the magistrate may have to pass upon bills against the person whom he had bound over for trial. State v. Graham, 60 S.E. 431 (1908). The

South Carolina Supreme Court has also determined that there is no abuse of discretion in seating a juror who had once worked for SLED, State v. Hess, 279 S.C. 14, 301 S.E.2d 547 (1983), but that one who had previously passed upon the facts of the case cannot be competent to sit as a juror on a subsequent trial of the same case. City Council v. Fowler, 25 S.C. 901, 25 S.E. 900 (1896). In any event, it is necessary for the complaining party to make a showing of prejudice by the fact that the juror served on the jury. Bryant v. State, supra; State v. Graham, supra; State v. Rector, 155 S.E. 385 (1930).

This Court initially finds that S.C. Code Ann. §14-7-820 should be interpreted to mean that any person employed within the walls of any county courthouse should be ineligible to serve on a jury. The entire statute read in context limits its application to specific county officers. S.C. Code Ann. §14-7-850 further strengthens this

argument in that it exempts, rather than disqualifies, officers of the United States from serving on a jury. See State v. Matthews, supra. Mr. Clark was employed by the federal government and was not a county officer. This is important in that it is the county officers or employees in county courthouses who may have contact or opportunity for contact with or knowledge about the trial matters of this nature -- not unrelated entities such as a federal bankruptcy court.

This Court also finds that Mr. Clark was not barred by the statutory provision disqualifying a person employed within the walls of any courthouse. The statute could not have contemplated employment in a limited purpose facility which specializes in non-jury matters. It is clearly inferable that the evil sought to be guarded against was service by employees who are located

within the walls of courthouses hearing the same or similar matters.

This Court further finds that Mr. Clark's place of employment was not a courthouse. In 1986, the United States Attorney's office was located in the Federal Building in Columbia, South Carolina. The Federal Building is a federally owned and managed property in which tenants lease office space. This Court finds that the United States Bankruptcy Court was one of those tenants but was confined to two floors of the building. The fact that the Bankruptcy Court leased and occupied two floors of a federally owned building does not make the entire building a United States Courthouse. In fact, the United States Courthouse was and is still located across the street from the Federal Building. Moreover, the Bankruptcy Court was contained within two floors of the building and the United States Attorney's Office occupied a totally

separate and segregated location. Further, the United States Attorney's Office and the Department of Justice are within the executive branch of the federal government and not the judicial branch. Clearly, the United States Attorney's office was not operating within the walls of a courthouse as contemplated by the statute.

As to a "natural bond" between the prosecution and Mr. Clark based upon Mr. Clark's position within the civil division of the United States Attorneys' Office, this Court finds that there is no automatic disqualification in such instances. See State v. Matthews, supra; State v. Hess, supra. Had the legislature intended to disqualify from service on any jury any employee of a prosecutorial or law enforcement agency, it could clearly have done so. Nevertheless, the record indicates that Mr. Clark served as a lawyer in the civil division and was not a prosecutor. Further,

during voir dire, Mr. Clark was questioned and indicated he could fairly and impartially serve on Applicant's jury. There has been no showing by Applicant of a "natural bond" or of any prejudice to him by the service of Emory Clark on his jury.

Most importantly the record reflects and it has been stipulated that trial counsel had thoroughly investigated potential jury members, was aware of Mr. Clark's employment, and very much desired to have Mr. Clark seated on Applicant's jury. (See Tr. p. 269 lines 15-18; Respondent's Exhibits #1 [Juror Strike Sheet], #6 [Jury List]). Notes made by trial counsel on the jury list indicate each juror was individually considered and that it was counsel's trial strategy to, if possible, seat Mr. Clark on the jury as a most desirable juror. It was counsel's opinion that Mr. Clark possessed the experience and knowledge to better understand the issues involved in

Applicant's confession and alibi defenses. Counsel's trial strategy was reasonable and Applicant has failed to show that counsel's action in this regard was deficient or prejudicial. The allegation should be denied and dismissed.

This Court funds that in no manner did Applicant's trial attorneys represent him ineffectively. This Court funds that the performance by trial counsel was exemplary and that the Application for Post-Conviction Relief must be denied and dismissed in its entirety.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed; and

2. That Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 6th day of June, 1993.

s/COSTA M. PLEICONES
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

---

James Donald Fossick,

Petitioner,

vs.

State of South Carolina,

Respondent.

---

Appeal from Richland County
Costa M. Pleicones, Judge

---

Opinion No. 24188
Submitted November 16, 1994
Filed January 30, 1995

---

**AFFIRMED IN PART AND REVERSED IN PART**

---

M. Anne Pearce, Assistant Appellate Defender, of South Carolina Office of Appellate Defense, for petitioner.

T. Travis Medlock, Attorney General; Donald J. Zelenka, Chief Deputy Attorney General; and Salley W. Elliott, Deputy Attorney Genera; all of Columbia, for respondent.

---

**PER CURIAM:** Petitioner claims the

Post Conviction Relief judge erred in failing to grant Post Conviction Relief because trial counsel did not object to the trial judge's charge on reasonable doubt. We disagree. Affirmed pursuant to Supreme court Rule 220(b) and the following authority: State v. Johnson, 306 S.C. 119, 410 S.e.2d 547 (1991) cert. denied, ___ U.S. ___, 112 S.Ct. 1691, 118 L.Ed.2d 404 (1992) (a reasonable doubt instruction which merely uses the term "substantial doubt," without any reference to moral certainty" or "grace uncertainty," is not reversible error).

Next, Petitioner claims the Post Conviction Relief judge erred in failing to grant Post Conviction Relief when trial counsel did not object to solicitor's closing argument that the Petitioner showed no remorse. We agree and reverse the circuit court order denying Petitioner's Post Conviction Relief pursuant to Supreme Court Rule 220(b) and the following authorities:

State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987) ("No right is more fundamental than the right of an accused to plead not guilty...Comments by the prosecution upon an accused's failure to express remorse invite the jury to draw an adverse inference merely because the defendant did not appear penitent."); Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984) (counsel ineffective for failing to object to improper closing statements by solicitor); Simmons v. State, 308 S.C. 481, 419 S.E.2d 225 (1992) (petitioner prejudiced "to the extent that there exists a probability that counsel's deficient performance affected the outcome of petitioner's trial.")

s/A. Lee Chandler C.J.
s/Ernest A. Finney A.J
s/Jean H. Toal A.J.
s/James E. Moore A.J.
s/John H. Waller, Jr. A.J.

"Petition for Rehearing
is denied.

s/Ernest A. Finney, Jr. C.J.
s/Jean H. Toal A.J.
s/James E. Moore A.J.
s/A. Lee Chandler A.J.

February 23, 1995."

**APPENDIX C**

ORIGINAL

ORIGINAL

(3)

Supreme Court, U.S.
FILED
JUN 26 1995
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

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No. 94 - 1939

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STATE OF SOUTH CAROLINA,

PETITIONER,

v.

JAMES DONALD FOSSICK,

RESPONDENT.

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

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ATTORNEY FOR RESPONDENT

24pp

## TABLE OF CONTENTS

TABLE OF CONTENTS . . . . . 1

TABLE OF AUTHORITIES . . . . . 2

STATEMENT OF THE CASE . . . . . 3

SUMMARY OF THE ARGUMENT . . . . . 11

WHY THE WRIT SHOULD BE DENIED

The Court should deny the writ for lack of jurisdiction. Alternatively, petitioner has failed to establish that the state court's decision was wrong under federal law . 11

CONCLUSION . . . . . 17

## TABLE OF AUTHORITIES

### Cases


Chaffin v. Stynchcombe, 412 U.S. 17 (1973) . . . . . 18

Donnelly v. DeCristoforo, 466 U.S. 637 (1984) . . . . . 21

Griffin v. California, 380 U.S. 609 (1965) . . . . . 17, 18

Jenkins v. Anderson, 447 U.S. 231 (1980) . . . . . 14, 16, 18

Malloy v. Hogan, 378 U.S. 1 (1964) . . . . . 16

Michigan v. Long, 463 U.S. 1032 (1983) . . . . . 12, 14

Rogers v. Richmond, 365 U.S. 534 (1961) . . . . . 15

Simmons v. State, 308 S.C. 481, 419 S.E.2d 225 (1992) . . . . 21

Sorrells v. United States, 287 U.S. 435 (1932) . . . . . 18

State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975) . . . . . 12

State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987) . . 12, 14

Strickland v. Washington, 466 U.S. 668 (1984) . . . . . 21

Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984) . . . 21

United States v. Jackson, 390 U.S. 570 (1968) . . . . . 17


### Other Authorities


U.S. Const. amend. V . . . . . 15-18

U.S. Const. amend. VI . . . . . 18

U.S. Const. amend. XIV . . . . . 15, 18

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

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No. 94 -

---

STATE OF SOUTH CAROLINA,

PETITIONER,

v.

JAMES DONALD FOSSICK,

RESPONDENT

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

Respondent James Donald Fossick respectfully requests that the Court deny the petition for a writ of certiorari sought in this case.

## STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct with respect to the procedural history of the case, with one significant exception. Contrary to petitioner's summary of respondent's argument on appeal to the Supreme Court of South Carolina from the denial of post-conviction relief, respondent asserted in support of his claim of ineffective assistance of counsel that the solicitor's argument impermissibly impugned

respondent's exercise of fundamental rights other than the privilege against self-incrimination. The Supreme Court of South Carolina, citing its own precedent, held (1) that the argument was an impermissible comment on the defendant's right to plead not guilty; (2) that trial counsel was ineffective in failing to object to the improper argument; and (3) that respondent was entitled to a new trial because there was a reasonable probability that the omission affected the outcome of the trial. Appendix B at A-48 to A-49.

The following is a counterstatement of the facts.

On May 11, 1985, the Saturday before Mother's Day, Marilee "Lee" Whitten went missing. A gas station employee remembered seeing Whitten twice on May 11th: once between 8:00 and 8:30 a.m. and again between 1:00 and 1:30 p.m. On Wednesday morning, May 15th, Whitten's body was discovered in a wooded area of lower Richland County, nude except for socks. She had died of a head injury caused by a "large, heavy object," type unknown. A pathologist testified that the body had been there at least two days; she could not testify with more certainty about the length of time because the weather had been extremely hot in the days immediately before the body was found. R.p.13, lines 8-15; R.p.87, line 22-p.88, line 13; R.p.93, line 7-p.95, line 9; R.p.138, line 9-p. 140, line 4; R.p. 175, line 24-p. 176, line 23; R.p.178, lines 13-22.

Whitten had worked as a groomer's assistant at a local veterinary clinic. Respondent and Shane Parker worked there also,

but in different areas. Whitten finished work at approximately 1:10 p.m. on May 11th. Parker and respondent had finished work at the same time. Parker and respondent were both questioned about the case immediately after Whitten's body was found. Parker stated that, on May 11th at approximately 1:30 p.m., he had seen respondent and Whitten talking to each other from their respective cars, at an intersection near where the body was ultimately discovered.[1] Shortly after 2:00 that same afternoon, Parker called Whitten's home, but she was not there. He lied to her mother about when he had last seen Whitten. Parker called Whitten's home again that night. Parker and Whitten had flirted at work and had exchanged telephone numbers. R.p. 96, line 5-p. 105, line 25; R.p. 118, line 4-p. 121, line 10; R.p.202, line 21-p.203, line 11; R.p.207, line 4-p.208, line 6; R.p.315, lines 17-18.

David "Andy" Anderson gave a statement to investigators on Saturday, May 18th. He reported that he had seen respondent at a restaurant in Woodhill Mall between 2:15 and 2:45 p.m. on May 11th. After Anderson finished his meal and got in his car, he saw respondent drive through the mall parking lot. Anderson then took a friend home and went to his own house, and from there to work. He got to work at 3:15 p.m. Anderson believed he had seen respondent at the mall approximately 30 minutes before he got to

---

[1]Contrary to petitioner's characterization of Parker's testimony, he did not expressly testify that he had seen respondent at the window of Whitten's car. See R.p.101, line 13-p.103, line 19.

work. At trial, Anderson testified that respondent had approached him at school and asked him to be a witness to his whereabouts on May 11th. This happened either Wednesday, May 15th, or Thursday, May 16th. R.p.323, line 13-p.332, line 3. Contrary to the factual representation in the State's petition to this Court, there is no evidence that the request was made by respondent **before** Whitten's body was found. See R.p.329, line 8-p.331, line 12.

Brian Simons talked with respondent in a nearby Piggly Wiggly grocery store parking lot at 2:15 or 2:30 p.m. on May 11th. At 2:45, respondent and Simons drove separately to an animal shelter, where respondent hoped to find a dog to give his mother for Mother's Day. The shelter was closed; when their pleas for admission were unsuccessful, they left. Simons estimated the time was 3:05 p.m. Respondent arrived at his parents' home between 3:30 and 3:45 p.m. He played basketball at a neighbor's house between 4:15 and 6:00, then spent the rest of the evening at home. R.p.333, line 16-p.345, line 19; R.p.349, line 9-p.352, line 12; R.p.363, line 4-p.366, line 10; R.p.372, line 24-p.373, line 6.

The case languished until September 4, 1984, when investigators again interviewed respondent. He was 17 years old. He had no lawyer present at the interview. Respondent gave an alibi. The investigating officers told him they knew he had killed Whitten. The officers offered him psychological counseling. They talked about capital murder and the electric chair. The officers told respondent they would speak in his favor if he confessed. Ultimately, respondent signed a statement that began: "I've been

wanting to come so long and turn myself in." Respondent stated that he had struck Whitten in the head with an urn, dragged her some distance and left her naked in the woods. Respondent described the victim as lying "flat on her back with her legs slightly spread and an arm over her stomach." He further stated that he had transported Whitten to the wooded area in the trunk of his car and that she had scratched him and bitten him on the arm before he killed her. After signing the statement, respondent directed investigators to the site where the urn had been disposed of and pointed it out. The site was approximately one mile from where the victim's body was discovered. R.p. 18, line 11-p. 19, line 21; R.p. 23, lines 1-p. 30, line 14; R.p. 38, line 4-p. 52, line 8; R.p. 161, line 16-p. 162, line 2; R.p. 238, line 5-p. 243, line 1.

Petitioner asserts that respondent showed law enforcement officers a scar on his arm caused by the victim's bite; however, the testifying officer described the marks as "old bruises." R.p.241, lines 18-22. This was nearly four months after the incident. R.p.248, line 20-p.249, line 5. Respondent was wearing faded blue jeans and a light colored tank top or T-shirt on May 11th; yet, no one who saw him that afternoon observed any blood, bites or scratch marks on his arms or clothing. R.p.326, lines 1-8; R.p.338, lines 8-9; R.p.350, lines 2-8; R.p.363, lines 21-25; R.p.366, lines 5-8.

Moreover, petitioner's assertion that law enforcement officers reported that respondent did not appear upset or show any emotion

when he confessed or when he saw the urn is inaccurate. The investigator to whom respondent gave the confession acknowledged, "There was a redness in his eyes. He did make some statements about he felt better and that kind of thing." R.p.264, lines 14-23. Although he described respondent as calm, the officer who accompanied respondent to the site where the urn was found testified that respondent "brought up the fact that he sure felt better" after pointing out the urn. R.p.290, line 8-p.292, line 6.

There was no physical evidence identifying respondent as the perpetrator. Respondent had consented to submit to a head and pubic hair search on May 20, 1985. However, investigators were unable to find any hairs or fibers belonging to respondent on the victim. Nor did they find the victim's hairs, fibers or blood in the trunk of respondent's car or on the urn. No identifiable fingerprints were found on the victim's car. At 18 pounds, the urn was unwieldy for any but the very well coordinated. Significantly, the victim's body was in a different position than respondent described: her legs were spread widely apart, not slightly apart, and her arm was not over her stomach. R.p.141, lines 2-23; R.p. 163, line 2-p. 166, line 23; R.p. 170, line 18-p. 172, line 12.

On the other hand, there was independent evidence to support respondent's alibi defense. Mary Bushell lived at the intersection where Parker claimed to have seen respondent talking to Whitten at 1:30 p.m. on May 11th; the road was visible from her bedroom window. Between 1:00 and 2:30 p.m. on the day in question, Bushell saw three cars parked outside her window. Bushell testified that

a woman similar to Whitten and a man similar to Parker were among the four persons present. The woman was sitting in a yellow car. Parker's car was there; it left first. Bushell did not see either respondent or his car at that time. R.p.390, line 8-p.401, line 17.

Between 3:30 and 4:15 p.m. on May 11th, Boy Scout master Vernon Ketten saw Whitten's car being driven in the neighborhood where her body was later found. He remembered it because of a distinctive bumper sticker. Although he could not see the driver's face, her hair was the same color and length as Whitten's. There was a male passenger in the front seat. R.p.402, line 25-p.406, line 13.

At trial respondent repudiated his custodial statement. He testified that he left work at 1:10 p.m. on May 11th. Parker and Whitten were talking together in the parking lot; Parker offered respondent some marijuana resin, but he declined. Leaving them in the parking lot, respondent ran a series of errands. He estimated that he arrived at the Richway store at Woodhill Mall at 1:20, where he spent about half an hour. He spotted Andy Anderson at a mall restaurant as he walked to another store about 2:00 and left the mall in his car some 15 minutes later. He got gas; on his way to the animal shelter he met Brian Simons and pulled into the Piggly Wiggly parking lot at approximately 2:45. Respondent and Brian arrived in separate cars at the animal shelter about 3:15. They stayed some five minutes, looking at dogs through the fence, then parted ways. After a five-minute stop at a second animal

shelter, respondent returned to his parents' home between 3:30 and 3:45 p.m. He left to play basketball and came home in time for supper. He did not go out that night. The next night Parker called respondent, told him he had killed Whitten with some kind of tire tool and asked respondent to cover up for him. When investigating officers interviewed him later, respondent first told them the truth, then changed his story. He was afraid of the officers: they told him they knew he had killed Whitten and threatened him with the electric chair. At the same time he thought they were offering him help and a way out for both himself and Parker. He wanted to help Parker out. For these reasons, he complied with their request to give a confession. R.p. 411, line 7-p. 452, line 22; see R.p.122, line 24-p.126, line 10.

The solicitor cross-examined respondent as follows:

> Q How did you feel knowing that she was laying out there for all those days?
>
> A I didn't know she was out there.
>
> Q It didn't bother you?
>
> A I didn't even know she was out there. How can it bother me?
>
> Q It didn't bother your conscience?
>
> A I didn't even know she was out there.

R.p.476, lines 11-18 (emphasis added).

In his closing argument, the solicitor made the following remarks:

> It took [respondent] 28 minutes and 37 seconds. That's all it took him, 28 minutes and 37 seconds. He's got no remorse, no tears. He has got nothing, nothing. He wants you to be duped. He wants you to go back and say,

"We've got Nazis on our Sheriff's Department that are going out and beating and forcing confessions out of people." Now, really, really.

He met with them on four or five occasions and wouldn't give a confession. Finally, when they had him [sic] nailed him down to every minute of the day, faced him with it, he told them, "That's the way it happened. That's the way it happened."

* * *

You know, the innocent, they have a right to a jury trial and so do the guilty. Everybody that puts their hand on this Bible, they don't tell the truth. If they did, we certainly wouldn't need jurors. You go back and weigh out the logic and you weigh out whether or not this confession is true and accurate. It fits like a glove again. Go back and vote guilty and come back in here and tell people like [respondent], without remorse, without feeling, without anything, that "We aren't going to tolerate it here in our County." Thank you.

R.p. 535, line 19-p.536, line 5; R.p. 536, lines 14-24 (emphasis added). And with that, closing arguments ended.

## SUMMARY OF THE ARGUMENT

In granting respondent a new trial, the Supreme Court of South Carolina relied on its own caselaw as precedent. Because reliance on federal law is not apparent on the face of the opinion, the writ should be denied for lack of jurisdiction. Under any analysis, the solicitor's remarks violated fundamental rights and prejudicially affected the outcome of the trial. Petitioner has failed to establish that the state court's decision incorrectly applies federal law.

## ARGUMENT

### I. THE SUPREME COURT OF SOUTH CAROLINA PROPERLY HELD THAT THE SOLICITOR'S CLOSING ARGUMENT WAS AN IMPERMISSIBLE COMMENT ON THE EXERCISE OF FUNDAMENTAL CONSTITUTIONAL RIGHTS.

Petitioner asserts that respondent was not denied effective assistance of counsel when his trial attorney failed to object to the solicitor's closing argument regarding lack of remorse. Petitioner contends that the state court's decision in this case is contrary to this Court's interpretation of the Fifth Amendment privilege against self-incrimination. Petition at 25-32. Rather, petitioner characterizes the argument as proper comment on the evidence. Petition at 32-35. In making these assertions, petitioner has overlooked critical points of law and fact.

#### A. This Court lacks jurisdiction to review the state court's decision, which does not rely on federal law.

The decision of the Supreme Court of South Carolina in this case was rendered under state law. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), is the sole authority cited for the conclusion petitioner challenges. See Appendix B at A-48 to A-49. Because reliance on federal law does not appear on the face of the opinion, the writ should be denied for lack of jurisdiction. Michigan v. Long, 463 U.S. 1032 (1983).

#### B. Petitioner's reliance on this Court's interpretations of Fifth Amendment right to remain silent is misplaced.

Respondent signed a waiver of rights, including the privilege against self-incrimination, each time he was interviewed by law enforcement officers before his arrest. The state relied on the last of these statements, a confession, and the accompanying waiver

of rights to prove respondent's guilt.

Waiving his privilege once again, respondent took the witness stand at trial. He testified that his confession was a lie, motivated in part by his promise to cover for Shane Parker and induced in part by the officers' threats and promises. The prosecution's case included evidence of these threats and promises. By waiving the Fifth Amendment privilege at trial, respondent put in issue the voluntariness of the pretrial confession under the due process clause of the Fourteenth Amendment. See Rogers v. Richmond, 365 U.S. 534 (1961).

At no time, however, did respondent just stand silent. Because silence per se was not the basis for the challenged remarks, petitioner's argument falls wide of the mark. The challenged remarks were in no sense a comment on, or use of, the accused's silence. Nor did the Supreme Court of South Carolina make such a finding. Therefore, in contradistinction to the cases cited by petitioner, there is no issue as to whether the solicitor's comment was a permissible or impermissible reference to the Fifth Amendment right to remain silent.[2]

One case cited by petitioner particularly merits discussion. In Jenkins v. Anderson, 447 U.S. 231 (1980), the defendant, charged with murder, testified that he acted in self-defense. The Court

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[2]The Fifth Amendment privilege against self-incrimination implies the right to plead not guilty and compel the state to establish guilt by independent evidence. See Malloy v. Hogan, 378 U.S. 1 (1964). Respondent exercised these derivative rights. Perhaps this is the source of petitioner's confused attempt to apply the Fifth Amendment in this case.

sanctioned the use of his prearrest silence for impeachment, on the grounds that its inconsistency with a later claim of excuse was probative, that it was not induced by governmental action, and that the privilege had been waived at trial. Neither Jenkins nor its underlying reasoning have any sway in this case. The solicitor did not remark on respondent's earlier silence, and respondent had waived no other right, opening the door to comment on its previous exercise. Moreover, neither petitioner's exercise of rights nor the lack of remorse with which the exercise was equated, is probative where the defense is outright innocence.[3] Absence of remorse is fully consistent with absence of guilt; therefore, it has no impeachment value.

**C. There was ample evidence of remorse at the time respondent confessed to murder, nor was the solicitor's comment otherwise based on evidence adduced at trial.**

A prosecutor may comment on the evidence and its reasonable inferences in summing up the state's case to the jury. State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). The record in this case, however, fails to support petitioner's assertion that the solicitor's lack-of-remorse argument was a permissible comment on the evidence. Although respondent maintained his innocence from May until September 1985, the record reveals evidence of remorse or

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[3]Lack of remorse may be relevant to the issue of malice in a murder case. It may have some impeachment value where the accused admits committing homicide, for example, but claims legal provocation, justification or excuse. Even then, the absence of remorse must have an evidentiary basis. In such a case, as here, an argument that the accused lacks remorse merely because he elected to be tried by a jury, or to testify in his own defense, would violate due process.

repentance at the time respondent confessed, both in words and in appearance. His eyes were red. Respondent repeatedly stated that he felt better for confessing. Indeed, the confession itself begins, "I've been wanting to come so long and turn myself in." This sentence alone savors strongly of remorse.

Ironically, the contemporaneous expressions of remorse lent credence to the confession, which was the heart of the state's case. Had respondent exercised his right to remain silent at trial, had he not repudiated the confession at trial, the solicitor almost certainly would not have dared claim respondent was unpenitent.

But repudiate the confession he did, and it was the repudiation alone that triggered the solicitor's remarks. The wording of the argument points absolutely to respondent's assertion of rights as the basis for the "remorseless" characterization. Contrary to petitioner's assertion, this was not a permissible reference to respondent's demeanor during his trial testimony. Under South Carolina law, it is improper to "invite the jury to draw an adverse inference merely because the defendant did not appear penitent" where remorse would be irreconcilable with the defense.[4] State v. Johnson, 360 S.E.2d at 319.[5] More than

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[4]The inconsistency here is crystalized in the solicitor's cross-examination of respondent:

Q How did you feel knowing that she was laying out there for all those days?

A I didn't know she was out there.

Q It didn't bother you?

improper, it is fundamentally unfair. The solicitor expressly referred to respondent's election to be tried by a jury and to testify in his own defense and suggested that the choices themselves evidenced lack of remorse, and thus guilt.[6] This deprived respondent of a fair trial.

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A I didn't even know she was out there. How can it bother me?

Q It didn't bother your conscience?

A I didn't even know she was out there.

R.p.476, lines 11-18 (emphasis added).

[5]This is a matter of state evidentiary law. Even if this Court finds that "the state court decided the case the way it did because it believed that federal law required it to do so," Michigan v. Long, 463 U.S. at 1041, this Court's contrary construction of the Constitution need not restrict state evidentiary law. Jenkins v. Anderson, 447 U.S. 231, 240-41 (1980).

[6]The petition omits the most telling of the solicitor's remarks:

> You know, the innocent, they have a right to a jury trial and so do the guilty. Everybody that puts their hand on this Bible, they don't tell the truth. If they did, we certainly wouldn't need jurors. You go back and weigh out the logic and you weigh out whether or not this confession is true and accurate. It fits like a glove again. Go back and vote guilty and come back in here and tell people like [respondent], without remorse, without feeling, without anything, that "We aren't going to tolerate it here in our County." Thank you.

R.p. 536, lines 14-24 (emphasis added).

**D. The solicitor's closing argument was an impermissible comment on the exercise of other rights secured by the Constitution, including the right to a jury trial and the right to testify in one's own defense.**

The petition does not address the actual basis of the state court's decision, namely, that a comment on failure to express remorse violates rights other than the privilege against self-incrimination. On this issue, Griffin v. California, 380 U.S. 609 (1965), is instructive by analogy.

Indeed, the analogy is almost perfect. In Griffin, the accused exercised his right to remain silent at the guilt phase of his capital murder trial; the jury was instructed that his silence on any points he could reasonably be expected to deny or explain could be viewed as evidence of guilt. The Court ruled that the instruction violated the Fifth Amendment. Beyond that, the opinion suggests that the instruction was inherently unfair: "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 614. Thus, the instruction had a chilling effect on the assertion of the right, for an accused might reason that he should forego his privilege if it will only be used as evidence of guilt. See also United States v. Jackson, 390 U.S. 570 (1968) (federal antikidnapping law limiting to jury power to impose death sentence impermissibly discouraged exercise of rights to jury trial and to plead not guilty).

Similarly, here, respondent exercised virtually every fundamental right associated with a criminal proceeding except the right to remain silent. Respondent pleaded not guilty; he

required the State to prove his guilt beyond a reasonable doubt; he presented a defense; he testified in his own behalf, repudiating his earlier uncounseled confession. U.S. Const. amends. V, VI and XIV. The solicitor argued that respondent was guilty based on his earlier confession. Then he argued that, in exercising his right to a jury trial and in testifying as to his own innocence, respondent showed a lack of remorse. Thus, the solicitor, without justification, turned the very exercise of the accused's rights into further evidence of guilt. This is precisely what the Court found abhorent in Griffin.

As the state court held in this case, it was fundamentally unfair to permit an inference of guilt from nothing more than the exercise of rights that specifically designed to protect citizens from false conviction. Nothing in the exercise of these rights was inconsistent with respondent's defense. See Sorrells v. United States, 287 U.S. 435 (1932) (not guilty plea is not inconsistent with entrapment defense even though latter implies admission of offense); cf. Jenkins v. Anderson, supra. Nor is the inference of lack of remorse from the denial of guilt tolerable as an inevitable attribute of our system of criminal justice. Cf. Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (possibility of higher sentence on retrial does not impermissibly chill exercise of right to challenge first conviction by direct appeal or collateral attack).

Constitutional justification of such an argument is impossible. In asserting that the defendant is guilty and that he is simply without remorse if he claims otherwise, the prosecution

trivializes, even invades, the jury's role as finder of fact and arbiter of credibility. Such an argument belittles the presumption of innocence and mocks the right to present a defense. It diminishes the state's burden of proof.

In sum, the solicitor's argument was impermissible under the United States Constitution as well as under state law.

**II. THE SUPREME COURT OF SOUTH CAROLINA PROPERLY HELD THAT THE SOLICITOR'S CLOSING ARGUMENT WAS SO PREJUDICIAL THAT DEFENSE COUNSEL'S FAILURE TO OBJECT DEPRIVED RESPONDENT OF EFFECTIVE ASSISTANCE OF COUNSEL.**

The Supreme Court of South Carolina, finding that the solicitor's closing argument was objectionable, held that respondent was denied effective assistance of counsel because defense counsel failed to object. Appendix B at A-49. The state court further held that there was a reasonable probability that counsel's deficiency affected the outcome of the trial. Id. Petitioner asserts that the comments were insignificant, that there is strong evidence of respondent's guilt, and that respondent's trial was therefore a fair one. Petition at 35-40. The record, however, supports the state court's holding.

The remarks concerning lack of remorse were no mere passing references. The solicitor had the last argument, and the remarks came at the very end of that argument, giving them heightened emphasis. Indeed, the very last thing the jury heard from the advocates in this trial was the solicitor's equation of lack of remorse with respondent's choice to be tried by a jury and to testify in his own defense.

In that testimony respondent repudiated a pretrial confession, putting its veracity at issue. He testified to his whereabouts on May 11, 1985, in support of his alibi defense. Petitioner, asserting that the record shows that respondent was the last person to be seen with the victim in the vicinity where her body was later found, overlooks contradictory evidence. Petition at 38. Respondent testified that he did not see the victim again after he left work at 1:10 p.m. A witness to the supposed later meeting between respondent and the victim could not place respondent at the scene; another witness saw the victim's car with a driver similar to the victim at a time when other witnesses testified respondent was with them. Contrary to petitioner's further assertion, respondent fully accounted for his whereabouts throughout the day. The fact that he met no one he knew as he shopped for 30 minutes or more in a mall store in a large metropolitan area is hardly surprising. It is certainly not strong evidence of guilt. Completely unfounded is petitioner's assertion that respondent asked a witness to go to court for him before the victim's body was found. Petition at 39.

Without any independent physical evidence to link respondent to the crime, the state relied heavily on the repudiated confession. Althought the confession was consistent with the physical evidence, there was nothing conclusive about the match. On the other hand, what physical evidence there was allowed substantial room for fabrication, as respondent's testimony showed.

In sum, the solicitor's references to a lack of remorse

implied in the exercise of fundamental rights violated those rights and so were impermissible. Cf. Donnelly v. DeCristoforo, 466 U.S. 637 (1984) (petitioner made no argument that remarks prejudiced a specific right so as to amount to a denial of that right). Respondent established that he was deprived of effective assistance of counsel when his trial attorney failed to object during closing argument. Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984); see Strickland v. Washington, 466 U.S. 668 (1984). Moreover, there was at least a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different. Simmons v. State, 308 S.C. 481, 419 S.E.2d 225 (1992). Therefore, the Supreme Court of South Carolina properly held that a new trial was warranted.

## CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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June 26, 1995

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June 26, 1995

Honorable William K. Suter
Clerk, U.S. Supreme Court
1 First Street, N.E.
Washington, DC 20543

Re: State v. James Donald Fossick

Dear Mr. Suter:

Enclosed you will find for filing, with proof of service, the original and ten (10) copies of the motion for leave to proceed in forma pauperis with affidavit along with a brief in opposition to the petition for a writ of certiorari in the above case.

Yours sincerely,

M. Anne Pearce
Assistant Appellate Defender

MAP/met

Enclosures

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

No. 94-

STATE OF SOUTH CAROLINA,

PETITIONER,

V.

JAMES DONALD FOSSICK,

RESPONDENT.

CERTIFICATE OF SERVICE

I certify that a copy of the motion for leave to proceed in forma pauperis along with affidavit and brief in opposition to the petition for a writ of certiorari in this case has been served upon Donald J. Zelenka, Esq., Assistant Deputy Attorney General, PO Box 11330, Columbia, SC 29211, this 26th day of June, 1995.

M. ANNE PEARCE
Assistant Appellate Defender

Sworn to and subscribed before me
this 26th day of June, 1995.

L.S.
Notary Public for South Carolina

My Commission Expires My Commission Expires October 21, 1996

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